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JAMES H. McKENNEY
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Supreme Court of the United States.

No. 255.

THE CITY OF CLEVELAND,
Appellant,

vs.

THE CLEVELAND CITY RAILWAY COMPANY,
Appellee.

No. 256.

THE CITY OF CLEVELAND,
Appellant,

vs.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
Appellee.

BRIEF FOR APPELLEE.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

THE CITY OF CLEVELAND,
Appellant,

vs.

THE CLEVELAND CITY RAILWAY COMPANY,
Appellee.

No. 255.

THE CITY OF CLEVELAND,
Appellant,

vs.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
Appellee.

No. 256.

WILLIAM B. SANDERS,
of counsel.

BRIEF FOR APPELLEE.

Statement.

The statement in brief for appellant does not, we think, in all respects present fully the condition of the various ordinances construed by the Court below

in reaching the decree complained of. We suppose there appears in the record, which by a series of misunderstandings we have not yet received, the opinion of the court below; but whether or not this be true, it is reported in full in the 94th Federal Reporter, page 385, and there will be found a very full statement of the situation of these two companies under their several contracts with the City of Cleveland, the legal effect of which the Court found required the decrees which were entered. We respectfully ask the attention of the Court to this statement there appearing, and also make the following summary of the situation.

FIRST, as to the Cleveland City Railway Company.

This company is a corporation of Ohio, with a capital stock of $8,000,000. and a bonded indebtedness of something over $2,000,000. It is a consolidated company formed by the consolidation of the Woodland Avenue and West Side Street Railway Company and the Cleveland City Cable Railway Company. The Woodland Avenue and West Side Street Railway Company was organized in 1885, and it was a consolidated company formed by the consolidation of the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the last named, the Woodland Avenue Railway Company, was the successor by purchase of the Kinsman Street Railroad Company. By the terms of this purchase and the various consolidating agreements, the complainant, the Cleveland City Railway Company, became invested with all and singular the franchises of the above mentioned companies. When the Woodland Avenue and West Side Street Railway Company was organized, the constituent companies which made up that organization were independent lines of railway, one operating chiefly upon the west side

of the Cuyahoga River and the other upon the east side, running to the north easterly portion of the city. Each was acting under independent franchises and contracts with the City of Cleveland. There was no exchange of traffic by way of transfer, and each company was charging a fare of *five cents* over its lines. And at that time the West Side Railway Company had by ordinance the right to continue operations for twenty five years from February, 1883, and to charge a *cash fare of five cents for each passenger carried.* The Woodland Avenue Railway Company was operating its lines of road under several grants, among others a grant made in 1879, relating to the operation of cars from Water Street through Superior and Ontario Streets and Kinsman Street to Madison Avenue. (Record, 141.) This grant provided among other things that the company should not charge more than five cents cash fare, and in said ordinance was reserved the right to the municipal council to thereafter increase or diminish the rate of fare as it might deem justifiable and expedient, this being the ordinance known as "*The Kinsman Street Ordinance*" and under which the appellant claimed the right to put into operation the ordinance reducing the fare, set up in the bill of complaint. *In 1883* an ordinance was passed granting the Woodland Avenue Railway Company the right to extend and construct its line of railway upon Woodland Avenue from the crossing of the C. & P. Railroad Company's tracks to Corwin Street, (Record, 148) and in this ordinance provision was made for the operation of cars over the entire line, *including the line referred to in the Kinsman Street ordinance,* the company agreeing that during the continuance of such grant it would charge but *one rate of five cents over its entire line including such extension.* In 1885, upon the consolidation forming the Woodland Avenue and West Side Street Railroad Company, the city council passed an ordinance requiring the company to carry passengers without change of cars by the running of through cars over its entire line for a single fare and at a rate of fare "*not*

greater than five cents"; and requiring that tickets shall be sold at the rate of eleven for fifty cents or twenty-two for one dollar. (Record, 149). This ordinance was duly accepted by the Woodland Avenue and West Side Street Railroad Company and its terms have been complied with; and the provisions so fixing the rate of fare to be *charged at five cents had reference to and included the operation of cars upon that portion of Woodland Avenue*, formerly Kinsman Street referred to in the ordinance sought to be enjoined by the bill. Again, *in April, 1887*, the Woodland Avenue and West Side Street Railroad Company accepted an ordinance requiring them to build an extension upon Franklin Avenue; (Record, 152) and in and by said ordinance it was provided that the company should carry over its entire line, including said extension, *at a rate of fare not to exceed five cents.* This ordinance is still in force. *In August, 1887*, another ordinance was passed by which the Woodland Avenue and West Side Street Railroad Company was required to build an extension; (Record, 153) and again it is provided that but *one rate of fare of five cents shall be charged over the entire line; this line including the portion of the old Kinsman Street line with respect to which the Council claimed in the ordinance attacked in the bill to have the right of regulation. In 1892* another ordinance was passed and accepted by the Woodland Avenue and West Side Street Railroad Company, providing for an additional track upon *Kinsman Street*, (Record, 154) which ordinance required large expenditure of money by way of paving and repairs of pavement; and in this ordinance it is provided that the company shall charge but one fare between any points on said company's line and extension *and sell tickets at the rate of eleven for fifty cents or twenty two for one dollar.*

Prior to May 13th, 1883, the *Cleveland City Cable Railway Company*, the other constituent Company making up the complainant the Cleveland City Railway Company, owned and operated various independ-

ent lines of railway in the city. And with respect to each one of its ordinances, it was permitted to charge a cash fare of *not to exceed five cents.* In *May, 1893,* at the time of the consolidation, the two companies addressed a communication to the city council (Record, 157) notifying it of their agreement in that respect, and that it was proposed to establish a cross town line and charge but one fare for a continuous ride upon any additional lines within the City of Cleveland. Upon the receipt of this communication, the council on *May 10th, 1893,* passed a resolution approving the proposed consolidation upon the terms and agreements stated in such communication ; and since the first day of June, 1893, the Cleveland City Railway Company, the complainant, has operated the said various lines of street railway, charging a cash fare of five cents for each passenger and selling tickets good for passage over its entire lines as required by said several ordinances.

In this situation the city coucil passed, on the *17th of October 1898,* the ordinance which is attacked in the bill of complaint, entitled "*An ordinance to provide for a diminution of fare, under an ordinance granting a renewal of the franchise to the Kinsman Street Railway Company.*" (Record, 158.) This ordinance recites the provision of the so-called Kinsman Street ordinance of 1879, reserving "*the right to hereafter increase or diminish the rate of fare as may seem justifiable and expedient*" and further recites "*the council now deems a diminution of fare justifiable ;*" and by Section 1 of the ordinance provides "*that the rate of fare for a single continous passage over the lines and all extensions thereof operated under the aforesaid grant to the Kinsman Street Railway Company, be and the same hereby is fixed at four cents cash fare over the whole or any part thereof ;*" and also requiring in another section the sale of tickets at the rate of seven tickets for twenty-five cents.

The contention of the Cleveland City Railway Company, the complainant, and upon which it sought and obtained the permanent injunction shown in the

record, is that said last mentioned ordinance of *October 17, 1898*, which so requires it to carry upon a portion of its line at a *cash fare of four cents* and to sell tickets at the rate of seven for twenty five cents, *is in violation and contravention of the contract relations existing between the said company and the City of Cleveland*, and impairs its contract rights in this, *that whereas it is entitled by virtue of the several ordinances herein referred to, to charge upon all of its said lines a cash fare of five cents, the provision of said ordinance requires it to accept a cash fare of four cents, and whereas it is entitled as respect ticket fares to sell tickets at the rate of eleven for fifty cents or twenty two for one dollar, this ordinance requires it to sell tickets at the rate of seven for twenty five cents, and this the complainant claims would be an impairment by law of the State of Ohio of its contract rights growing out of said ordinances and its acceptance thereof.* It is also set out in the bill of complaint and contended by the complainant that the practical effect of this ordinance would be to reduce the rate of fare to four cents for a cash fare and three and four-sevenths cents for a ticket fare; that experience in railroad operation has shown that where there is such a difference between ticket and cash fare, at least seventy per cent. of the passengers use tickets; and complainant shows that it would be obliged to carry about seventy per cent. of it passengers at the rate of three and four-sevenths cents. whereby its gross receipts would be reduced more than one fifth, while its operating expenses would remain the same; and that the practical operation of the ordinance would be to diminish its net receipts more than fifty per cent; and the bill gives a comparative statement of gross and net receipts for the year 1897, showing the number of passengers carried, the rate per passenger received under existing ordinances, and what its receipts would have been had the ordinance of October 17, 1898, been put in force; and from this statement it appears that its gross receipts would have

been reduced something more than twenty per cent. and that the company would have suffered a loss in income of over $220,000, more than 52.5 per cent of its net income, whereby it is contended that it would sustain losses which, without including anything for interest charges, depreciation, dividends or interest on capital, and nothing by way of sinking fund, would deprive it of any reasonable profit which it is entitled to obtain from its property, and consequently taking its property without due process of law.

SECOND, as to the Cleveland Electric Railway Company.

This Company is a corporation with a capital stock of $12,000,000. and a bonded indebtedness of about $3,750,000. It is a consolidated company, exercising all the rights and franchises which had theretofore been granted to the East Cleveland Railroad Company, the Broadway and Newburgh Street Railway Company, the Brooklyn Street Railroad Company and the South Side Street Railroad Company.

The East Cleveland Railroad Company was a corporation which had operated lines of railways in Cleveland since 1859, and was operating a line on Euclid Avenue extending from the business portion of the city on Bank Street through Superior Street, Euclid Avenue, Erie Street, Prospect Street, Case Avenue and Euclid Avenue to the city limits. It also had a Garden Street line, a Cedar Avenue line and a Wade Park Avenue line. All these lines were being operated under grants from the City of Cleveland upon the faith of which the company had constructed its road. Prior to September 15, 1879, the East Cleveland Railroad Company was operating its main line from the intersection of Superior and Water Streets to the easterly limits of the city on Euclid Avenue under various grants, some from the city council, some granted by the county commissioners

before the territory affected thereby became a part of the city, and still other grants from the authorities of the former village of East Cleveland; and the contract rights of the company for the operation of its road easterly of Wilson Avenue contained no restrictions respecting the rate of fare to be charged, and extended for aperiod of nearly twenty years; and at that time east of Wilson Avenue upon Euclid Avenue there was but a single track; and under contracts and agreements then in force between the company and the public authorities, it had the right to charge passengers one fare from Water Street to Wilson Avenue, another fare from Wilson Avenue to Fairmount Street, and still another fare from Fairmount Street to the City limits; and it was in fact charging two fares between Water and Superior Streets and the city limits.

In this situation the East Cleveland Railroad Company and the city entered into a new contract providing for the renewal of the grant to the East Cleveland Railroad Company over a portion of the line then operated from Superior and Water Streets, through Superior Street, Erie Street, Prospect Street, Case Avenue, Euclid Avenue, and along Euclid Avenue to *Wilson Avenue;* and the said ordinance imposed new conditions as respects paving to be done by said company, removal of snow and ice and other similar provisions, and by Section 6 of said ordinance it was vided "*that said company should not charge more than five cents each way for a passenger over the whole or any part of the line therein renewed*" (Record, 177); and the council reserved to itself the right to *thereafter increase or diminish the rate of fare as it might deem justifiable or expedient.* Under this ordinance, which was to remain in force for twenty-five years from the 20th of September, 1879, the company reconstructed its tracks between Superior and Water Streets and Wilson Avenue, and up to April, 1883, charged under the terms of the ordinance *one rate of fare to Wilson Avenue,* and *an additional fare of five cents*

easterly from Wilson Avenue. On *April 4th, 1883,* another ordinance was passed and accepted by which the company was granted the right to build an additional track on Euclid Avenue easterly from Wilson Avenue to Fairmount Street (Record, 181), and in this ordinance it was again provided that the council *reserved the right to thereafter increase or diminish the rate* of fare *between the westerly end of said company's line on Superior Street and the city limits.* The relation then between the company and the city was that the company had agreed to carry passengers over its lines to the city limits *for five cents,* but it had not *agreed to run through cars and was, in fact, operating only a portion of its cars as through cars.* Such arrangement was unsatisfactory both to the city and the company, and in *March, 1886,* another ordinance was passed dealing with *the rights of the company over this same line,* and by this *ordinance the company became obliged to construct and operate a double track in Euclid Avenue from the easterly line of Fairmount Street to the limits of the city and to pave between the rails of its track and to keep portions of the pavement in good repair; all of these obligations being in addition to those existing under former ordinances;* and in and by this ordinance it was provided that the company should operate *the whole of said track as a through line with through cars and should charge and collect* " *but one rate of not more than five cents for each passenger in either direction* " and that the contract should be in *force until the 20th of September, 1904* (Record, 184).

Up to July, 1888, the company operated in pursuance of this ordinance, and at that time entered into a further contract by ordinance with the city providing for the equipment and operation of its lines by electricity (Record, 186); and in this ordinance it was provided that the privilege of constructing the electric system and operation of said lines was granted to said company in consideration of the improved facilities contemplated and the large expense necessary to secure the same, and that the right to operate said line

should be and remain in force for the period of twenty five years from and after the passage of said ordinance ; but that no increase of the present rate of fare should be made by the company, and as alleged in the bill, the present rate of fare therein referred to, which was to be operative during the life of said contract, was as herein stated, five cents for each and every passenger carried in either direction over said line.

Thereafter the said company accepted an ordinance relating to the equipment of its Cedar Avenue lines with electricity, which was done at an expense of many hundred thousands of dollars ; and thereafter an ordinance to operate the line known as the Wade Park Avenue line (Record, 189), it being provided in said last mentioned ordinance that no increase of fare should be charged by said company on any part of its main line or said extension "*and that one fare not to exceed five cents or one of said company's tickets should entitle a passenger to transportation over the main line and the extension from the intersection of Lake and Water Streets to the easterly limits of the city.*" That prior to May, 1893, the *East Cleveland Railroad Company, the Broadway and Newburgh Street Railway Company, the Brooklyn Street Railway Company* and the *South Side Street Railway Company were engaged in* the operation of their respective lines of road in various and different parts of the city ; each of them was authorized by ordinance to charge a *cash fare of five cents*, and each was operating an independent line, no system of transfers existing.

Thereupon, about *April, 1893*, these several companies consolidated, forming the present complainant, the Cleveland Electric Railway Company, which succeeded to the rights of each of the constituent companies, and thereupon, upon *May 24, 1893*, the city council adopted a resolution consenting to said consolidation (Record, 192) and providing, among other things, as follows : "*That only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by any of said constituent companies*

and any line of any other of said constituent companies within the limits of the city of Cleveland, and passengers on any such line paying one fare shall be entitled without extra charge to be transferred to any other line." Said resolution further provided that the company should file with the city a written acceptance of the terms of said resolution, which it did on May 29th, 1893; and ever since the adoption of said resolution continued to operate said various lines of railway and to charge only the same cash fare of five cents for each passenger, in strict compliance of each of the above contracts which each of said companies had with the city, and put in force the system of transfers contemplated in said council resolution. That none of the grants or contracts under which said constituent companies which form the complainant were authorized to operate and so charge a cash fare of five cents had expired, but all of said grants were in full force. *That in 1893*, the complainant accepted an ordinance relating to extending its double track on Prospect Street to Erie (Record, 183), in which it was provided that in its operation it should comply with the regulations of the ordinance passed by the city council May 29th, 1893, approving said terms of consolidation.

Complainant alleges full compliance with all and singular terms and conditions of these several ordinances, and complains that the city on the 17th of October, 1898, passed an ordinance entitled "*an ordinance to provide for diminution of the rate of fare under Section 6 of an ordinance passed September 15, 1879*" (Record, 197) this being one of the original ordinances to the East Cleveland Railroad Company hereinbefore set forth; and it being undertaken by this last mentioned ordinance to *fix a cash fare of four cents and a ticket fare at the rate of seven tickets for twenty five cents.* The complainant the Cleveland Electric Railway Company makes the same contention with respect to said ordinance last mentioned as being in contravention of its contract obligations with the City of Cleveland with

respect to cash and ticket fares, and with respect to the practical effect of the ordinance if put into operation, as diminishing its receipts, as is claimed by the Cleveland City Railway Company which has been hereinbefore set forth, and claims that the rate of fare is unreasonable and would amount to the taking of its property without due process of law, and gives facts and figures which it alleges makes evident such contention.

The foregoing is a general statement of the contents of the bills of complaint in the two cases under discussion, and is taken in substance from the statement of facts appearing in the opinion of the Court in *94 Federal Reporter, 385*, to which reference has already been made.

The Court found as respects each of these complainants that it had a contract right as between it and the City of Cleveland to continue the operation of its various lines at a cash *fare of five cents, and a ticket fare of twenty two for one dollar or eleven for fifty cents*, and that the enforcement of the ordinances complained of which attempted to reduce this rate of fare was in direct contravention of such contract obligation. The complainants appealed to a Court of Equity to declare the ordinances void because they were without adequate remedy at law in the premises, fully setting out in the bills the multiplicity of suits, the various differences and annoyances which would arise in dealings with the public, and clearly upon the facts of the bills making a case in which equity only could furnish an adequate remedy. (Record, 205.) The Court upon motion for judgment upon the pleadings, the answer filed admitting the ordinances as pleaded, held that the enforcement of the ordinances complained of, of October, 1898, would be an impairment of the existing contracts between said complainants and the city, and thereupon adjudged them void. (Record, 232.) As respects the issue raised as to the reasonableness of the fare, the Court found it unnecessary to pass upon that question, as shown by its decree.

ARGUMENT.

Replying to the brief of appellant with respect to the errors assigned, and taking them in the order made, we submit:

I.

The two bills exhibited set forth a state of facts upon which the Circuit Court had jurisdiction to grant relief. The contention of the appellant on the question of jurisdiction, as we understand it, is that the ordinances complained of were not passed by virtue of delegated power from the State, and therefore they are not laws of the State which are within the prohibition of the Constitution against the impairment of contracts by State legislation.

We had not supposed that this question was open for discussion, in view of the many holdings of this Court upon the subject. The Legislature of Ohio, under *Sections 2701-2*, has authorized the City of Cleveland to make grants to street railroad companies prescribing the terms and conditions upon which railway lines may be located and operated. One of the matters with respect to which it may so contract by ordinance is the rate of fare to be collected during the life of the grant. These ordinances when accepted become contracts and cannot be annulled or amended without the consent of both parties.

Railroad Co. vs. Smith; 29th O. S., 292.
Cincinnati S. Ry. Co. vs. Village of Carthage, 36 O. S. 634.
City of Columbus vs. Columbus St. R. R. Co., 45 O. S., 104.
City Ry. Co. vs. Citizens St. Ry. Co., 166 U. S., 557.

It is not essential to Federal jurisdiction in enforcement of the guarantees of the Fourteenth Amendment

that there should be a valid contract or that the impairment or depreciation should really be effected through legislative or other action of the State; but it is sufficient if these grounds of suit are claimed in good faith and the contention is not wholly destitute of merit.

Citizens Railroad Co. vs. Citizens Street Railroad Company, 106 U. S., *supra.*
Illinois R. Company vs. City of Chicago, 176 U. S., 646.
Yazoo & M. V. R. Company vs. Adams, 180 U. S., 1.
Illinois Central R. Co. vs. Adams, 180 U. S., 28.
Vicksburg Water Works Co. vs. City of Vicksburg, 185 U. S.——
Riverside & A. R. R. Co. vs. City of Riverside, 118 Fed. Rep. 740.

In the City Railroad Company against Citizens Street Railway Company *(166 U. S., 557)* this Court say:

> " *All that is necessary to establish the jurisdiction of the Court is to show that the complainant had or claimed in good faith to have a contract with the city which the latter had attempted to impair. Conceding that the Legislature of the State alone had the right to make such a grant, it may be, as was observed in Wright vs. Nagle (101 U. S., 792), exercised either by direct legislation or by agency duly established having power for that purpose. The grant when made binds the public and is directly or indirectly the act of the State. The easement is a legislative grant, whether made directly by the Legislature itself or by any one of its properly constituted instrumentalities.*"

Again, in the same case, this Court say:

> " *There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the*

fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that jurisdiction depends upon the allegations of the bill and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that under the act of the General Assembly of 1861 and the ordinance of January 18, 1864, and April 7, 1880, the Citizens Railroad Company had become vested with certain exclusive rights to operate a street railway in the City of Indianapolis either in perpetuity or for the term of thirty years or thirty seven years, which the City had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets."

A similar bill was sustained by this Court in *Detroit against Detroit Citizens Street Railway Company (184 U. S., 368).* And that a bill in equity irrespective of diverse citizenship will lie to protect complainant against the impairment of contract rights or the taking of its property without due process of law, has been repeatedly recognized by this Court. Among other cases is that of *Chicago M. & St. P. Ry. Co. against Minnesota, 134 U. S., 460; Smyth vs. Ames, 169 U. S., 466.*

Apparently recognizing the authority of these cases, we understand the contention of counsel for appellant to be that as the ordinances attacked by these bills were passed in the attempted exercise of a right reserved in a former ordinance, such exercise by ordinance is not a legislative function, but is an action of the council in pursuance of contract, and therefore is not a law of the State within the principle of the cases to which we have referred. And quotation is made from Hamilton *Gas Light Company against Hamilton City, 146 U. S., 258,* in which this Court said that the suit could not be maintained, diverse citizenship not existing, if it was to be regarded as one in which the complainant merely sought protection against the vio-

lation of an alleged contract by an ordinance to which the State has not in form given or attempted to give the force of law. And quotation is made from the opinion in that case, wherein *Harlan, Justice*, says: "We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question and maintain and erect gas works of its own upon that section of the Municipal Code of Ohio adopted in 1869 providing that the city council of any city or village should have power whenever it was deemed expedient for the public good to erect gas works at the expense of the corporation or to purchase gas works already erected therein; which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the city."

We discover nothing in the language of the Court here quoted which sustains the contention of the appellant at Bar. The power which the city council of Cleveland possessed to pass any and all of these ordinances was legislative power delegated to it by the General Assembly of the State, and any ordinance which it so passed in pursuance of such delegation was a law of the State, which, if it impaired contracts or took property without due process of law, violated the Federal Constitution.

When the city council passed the original ordinances under which it reserved the power of subsequently changing the rate of fare, the ordinance which it so passed was the result of a legislative act upon its part, and when passed was a law of the State, and the right which the council reserved is a right which it also reserves under the same delegation of power. It is a right which it only could exercise by another legislative act, which it derives power to perform, not from the reservation, but from the delegation of power made to it by the General Assembly to fix by ordinance the terms and conditions of street railway grants.

Clearly the original ordinances of 1879 were "Laws of the State" and the "Hopkins and Cope Ordinances" which are attacked in the bill were legislative acts of the council passed in pursuance of the same delegation of power which authorized it to pass the original ordinances of which such reserved right is a part.

Manifestly the ordinances of which complaint is made in the bill were legislative acts of the council. The power which the council had to so legislate upon this subject was a power derived from the legislature. No contract between the railway companies and the city could confer power to legislate. The power to legislate must be derived from the Legislature; and in whatever form the council sees fit to exercise such legislative power, its authority so to do is at all times a delegated authority from the primary source, the General Assembly of the State.

In 1879 it was by virtue of delegated power in the city that it passed the ordinances in which it had power to fix the terms and conditions of operation. In the exercise of such delegated power it provided that it might thereafter by future legislation modify the terms of the legislative act as then enacted. Certainly when it exercises this reserved power of future legislation, its authority so to do must be referred to its original source, namely, the legislation of the State which delegated to the council the right to fix the terms and conditions of street railway ordinances.

It is clear, we submit, that there is no merit in the contention that the Circuit Court was without jurisdiction because the ordinances attacked were not ordinances in which the State, acting under delegated power, attempted by legislative act to impair the obligation of existing contracts.

This contention that because the city council in passing the ordinance in question acted under a reservation contained in a former ordinance that such action was not legislative, is completely answered by the ruling of this Court in Los Angeles vs. Los Angeles City Water Company, 177 U. S., 558. In this case it

was contended, the ordinance being one regulating water rates, that the contract only purported to bind the city in its corporate capacity and not as a governmental agent of the State; this contention being based on the fact that the ordinance complained of was passed under a reserved power in the original contract to regulate rates.

In reply to this contention this Court said:

> "The argument to support the contention, succinctly stated, is that the right to regulate rates came from the contract, not from the law; in other words, it was reserved from the contract and was a virtual granting back by the lessees of the proprietary right which would have otherwise passed by the lease, leaving, however, all municipal powers intact. * * * We think, therefore, the power to regulate rates was an existent power not granted by the contract but reserved from it with a single limitation, the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element. It was not, however, in granting the power of regulation, but in the limitation upon it."

And this Court sustained the jurisdiction upon an allegation that such subsequent action of the council under a reserved power in the contract was a legislative act and if it impaired the contract it might be attacked in the Federal Courts.

See, also, American Water Works & Guarantee Co. vs. Home Water Company, 115 Federal Reporter, 171.

II.

The bills present cases clearly within the jurisdiction of a Court of Equity.

It is contended in brief of appellant that it does not appear from the allegations of the bills that complainants were without adequate remedy at law, and that therefore a Court of Equity was without jurisdiction. And this contention, it is alleged, finds support in Detroit vs. Detroit Citizens Street Railway Company, 184 U. S., 386.

We discover in the opinion in this case nothing which lends color to the contention. It is true that in the opinion the Court refer to the fact that the contention as to the existence of an adequate remedy at law had not been made in the Court below, and the opinion says in sustaining the jurisdiction that that fact with others is taken into consideration in the opinion.

We submit that the allegations of the bill clearly bring the cases at Bar within *Detroit vs. Detroit Citizens Street Railway Company (supra)* and *Smyth vs. Ames, 169 U. S. (supra)* and that various well recognized grounds of equitable jurisdiction appear. A multiplicity of suits would necessarily follow an attempt to put these ordinances into force, and equity will entertain jurisdiction to prevent such a condition. The interests of hundreds of thousands of people in the City of Cleveland are at once directly affected by these ordinances, and an attempt to put them into force and the uncertainty of their validity and the inability of the public patronizing the road for reimbursement if they submit to the ordinances, in and of itself makes it apparent that there is no other appropriate proceeding to determine the question involved.

Again, the only practical method by which the street railway companies could insist upon their alleged rights would be by refusal to carry passengers at the

rates fixed in said ordinances, and the enforcement of such refusal by ejection of passengers from such cars, a situation which at once threatens public peace and order, and which can be in no other way prevented but by resort to a Court of Equity.

Again complainants' franchise would be in jeopardy, the contention creating a cloud upon its title.

It should be remembered that the relief sought in these bills is an adjudication that the ordinances in question are void, and that equity may properly maintain a bill seeking to have a law of the state declared void as one which in practical operation impairs contracts or takes property without due process of law, has been repeatedly recognized by this Court.

In the concurring opinion of *Mr. Justice Miller in Chicago &c. Ry. vs. Minnesota*, the learned Justice, in referring to the remedies which corporations have when aggrieved by unreasonable tariff rates, says :

" *There is an ultimate remedy by the parties aggrieved in the courts for relief against such oppressive legislation and especially in the Courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law. That the proper if not the only mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in Chancery asserting its unreasonable character, and its conflict with the Constitution of the United States, and asking a decree of the Court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of just compensation for the services rendered.*"

Upon the well settled principles of equity jurisdiction and the repeated utterances of this Court, it is submitted that the bill upon its face is clearly cognizable in equity.

III.

It is also assigned as error that the Court below erred in adjudging these ordinances void, as impairing the contract obligations of the City of Cleveland; and this is the only assignment of error which in any sense goes to the merits of this controversy.

We do not deem it at all pertinent to here discuss the powers of the City of Cleveland irrespective of its legislative power as a party to the contract under discussion. We are not concerned with the question suggested by counsel as to what would be the power of the city under a general grant of power to regulate from time to time rates of fare to be charged by street railway companies. The only pertinent discussion in the case at Bar is whether the City of Cleveland at the time of the passage of the ordinances attacked had existing contracts with the complainants which were impaired by such ordinances, and that such was the situation we submit is clear beyond the shadow of a doubt upon inspection of the record.

A. *As to the ordinances referring to the Cleveland City Railway Company.* It is true that in 1879 the City Council and the Kinsman Street Railway Company made a contract for a line then known as the Kinsman Street line which contained the provision that the council might thereafter reduce or diminish the rate of fare, and this was a grant in pursuance of delegated legislative power vested in the council; but it also appears that the Kinsman Street Railway Company became absorbed by the Woodland Avenue Railway Company and that in 1883 an ordinance was passed which authorized the Woodland Avenue company to extend its tracks and to operate for twenty five years over its entire system, including that part of its system which first belonged to the Kinsman Street

Railway Company, and in express terms it is provided in this ordinance that one rate of five cents over its entire line shall be charged. This provision that the company shall charge for twenty five years a rate of fare of five cents over its entire line is absolutely inconsistent with there remaining in the council a power as respects such portion of its line as was formerly operated by the Kinsman Street Railway Company to reduce the rate.

Again, in 1885 the Woodland Avenue Railway Company and the West Side Street Railroad Company were consolidated. These were lines operating at the time upon different sides of the river, having independent grants, and each of the companies was authorized to charge a cash fare of five cents. The effect of the consolidation was to establish a new main line from the south easterly to the westerly portion of the city, and by the terms of such consolidation as authorized and fixed by the council of the City of Cleveland, it was provided that "*no greater charge than five cents shall be collected, and tickets at the rate of eleven for fifty cents or twenty two for one dollar shall at all times be kept for sale on cars by conductors.*" The main line which was so established and with respect to which the contract was made had reference to and included the operation of cars upon that portion of Woodland Avenue formerly Kinsman Street which is referred to in the original Kinsman Street grant of 1879, and it in terms is an agreement upon the part of the Woodland Avenue and West Side Street Railway Company that it will thereafter carry passengers over such entire route at a cash fare of five cents.

Again, in 1887 the Woodland Avenue and West Side Street Railway Company accepted an ordinance which in terms provided that over its entire line it should charge not to exceed five cents.

In August, 1887, still another ordinance was passed and accepted by the company, which includes its entire line, including that which was originally Kinsman Street, and it is granted the right to operate until 1908

at a cash fare not to exceed five cents, between any points upon its line.

In June, 1892, a further ordinance is passed and accepted, which makes the same requirement of the company, that it shall charge but one fare and sell tickets at eleven for fifty cents or twenty two for one dollar over its entire line.

Clearly it was competent for the City of Cleveland and the railway company to make these several agreements, and although it is true that a reservation was made as respects Kinsman Street in 1879, it is true that in all these many subsequent ordinances dealing with the same subject matter, the city entered into contracts with this company entirely inconsistent with the future exercise of any such reserved right as is contained in the ordinance of 1879. By these several ordinances the City of Cleveland agreed in express terms that this company might operate for the period named over this entire territory at a cash fare of five cents. But if there can be any doubt upon this subject, looking only at the ordinances applicable to the Woodland Avenue and West Side Street Railway Company's line, such doubt entirely disappears when reference is made to the fact that the Cleveland City Railway Company not only operates under all of the grants theretofore made to the Woodland Avenue Company, but also the grant of the Cleveland City Cable Railroad Company. This last named company was operated under grants of the city for periods of years which had not expired and was authorized through the entire period of said grant to charge a cash fare of five cents, there being in none of said grants any reservation of the right on the part of the city to increase or diminish said rate of fare. And at the time of such consolidation, the common council passed a resolution approving and consenting to the consolidation, requiring the company to operate the entire property and to charge a cash fare of five cents for each passenger.

To now require this company to charge a fare of

four cents upon Kinsman Street is in direct contravention of the contracts made incident to the consolidation ; the two contracts could not be carried out at the same time, and the contract of 1893 is the later contract.

It appears upon the record that since the consolidation forming the complainant company the Cleveland City Railway Company, it has continued the operation of its various lines as proposed in said communication. It also appears that none of the grants under which the constituent companies which form said complainant were authorized to operate its cars on its various lines of railway at a cash fare of five cents had expired. And, quoting from the decision of the Circuit Court, we ask :

> " This being the situation, can the city successfully contend that the reservation in the ordinance of 1879 relating to the Kinsman Street Railroad Company is now operative as respects the complainant the Cleveland City Railway Company ? Prior to 1885 the West Side Street Railway Company was operated on the west side of the Cuyahoga River. There was no interchange of traffic by transfer between it and the Woodland Avenue Railroad Company, and passengers were obliged to pay a cash fare upon each road. The West Side company was operating under a grant running for twenty five years from February 1883, entitling it to charge a cash fare of five cents. The consolidation of the Woodland Avenue and West Side companies was made upon the condition that a new through line of street railroads should be established so that for a single fare passengers should be carried from any point to any point on the lines or branches of the consolidated company. Upon the taking effect of this consolidation, the relations of the two companies to the city were so far changed that whereas the companies before had had independent lines of railroad and

charged separate fares, a new through line was established and a rate of fare fixed upon the entire line of five cents. The right to so charge five cents and to carry a ticket fare at the rate specified of course involved the right to charge such fare for the whole or any portion of the distance traveled on the line. It was competent for the company and the city to at that time agree with respect to the terms and conditions including the rate of fare upon which this through line should be operated. The parties did make such contract and one of the terms of the contract related to the rate of fare to be charged over the entire line. A part of the line with respect to which the rate of fare was so fixed in 1885 was the same line referred to in the Kinsman Street Railroad Company ordinance of 1879 ; that is to say, the city and the railway companies in 1885 contracted with respect to the subject matter referred to in the ordinance to the Kinsman Street Railroad Company in 1879. This ordinance of 1879 at the time related solely to the rate of fare upon Kinsman Street, operated as an independent line. The ordinance of 1885 is a contract with respect to the same subject matter, but establishes a rate of fare which should apply to the Kinsman Street line, not as an independent line but as part and parcel of a direct through line from the south easterly to the westerly part of the city. It is to be observed that no reservation is contained in this ordinance of any right to increase or diminish the rate of fare therein fixed, and the right to operate under this ordinance of 1885 was in full force in October, 1898. It must follow that no power existed in the council in 1898 to change the rate of fare which has been so established by agreement between the parties. Again, it is apparent that the existence of any such reservation is inconsistent with the right which is expressly granted by the ordinance of 1885. This right could not

co-exist with the right in the council to reduce the rate of fare during the period as respects a portion of the line. By the contention of the city, the right to reduce could now only be made applicable to the Kinsman Street line, and its extension. The city, however, contracted in 1885 that the Company might carry over the Kinsman Street line as part of the through line at a cash fare of five cents, from which contract it necessarily followed that the entire contract relations of the company and the city as respects the rate of fare to be charged on the Kinsman Street line were merged in the contract of 1885, and the subsequent ordinances by which the Kinsman Street line ceased to be independent and became part and parcel of a through line upon which a rate of fare for the full period of time was established. * * *

" Again, in determining the contract rights of the complainant company, regard must also be had to its rights under the grants to the Cleveland City Cable Railway Company, which the present company acquired by the consolidation of 1893. The cable company had the right to operate at a cash fare of five cents its independent lines of railway. By virtue of the consolidation, its various lines became part of a great through system operated by the consolidated company whereby the public acquired the right of continuous passage over the entire line for one fare of five cents or a ticket fare at the rate of eleven tickets for fifty cents or twenty two for one dollar. * * * A portion of the entire system which this company is now operating under these several grants from the city was formerly the line of the Kinsman Street Railway Company, and the reservations under which the city now claims a reduced fare upon the portion of the line which was formerly the Kinsman Street line, was made with

reference to and can only have reference to the operation of the Kinsman Street line as an independent line. Now the situation has so far changed that by operation of law and by express contract with the City of Cleveland, this original Kinsman Street line has become part and parcel of a through line and as respects the rates of fare which can be charged upon such other line, the city and the railway company have entered into various contracts expressly fixing the rates of fare to be charged over the other line or any part thereof. If these ordinances as respects rates of fare which we have been examining passed since 1879 are to be construed as statutes, it follows that having been passed subsequent to the ordinance of 1879 relating to the Kinsman Street Railroad and relating to the same subject matter, they are so far inconsistent with the ordinance of 1879 as to operate as a repeal thereof. If we treat these subsequent ordinances simply as contracts, it is apparent that having entered into a contract in 1879, the city has subsequently entered into various other contracts relating to the same subject matter and that these later contracts are so far inconsistant with the provisions of the original ordinance as that the rights of the parties must now be measured by their latest contract and not by the original agreement. Again, the inconvenience, if not the absolute impracticablity of enforcing the obligations of both the original ordinance of 1879 and the subsequent ordinance in and of itself must well nigh force the conclusion that the rights of the parties must be gathered from these later rather than from the original ordinance. The complainant company confessedly has the right by contract to carry over its entire line or any portion thereof at a cash fare of five cents, and this it may do until its present grants expire in the year 1908, and what the city

proposes by the ordinance of 1898 is to compel the company as respects a portion of its line to carry at a cash fare of four cents. Tne right to carry at five cents over the whole line or any portion thereof is inconsistent with the obligation to carry for less than five cents over some portion of the through line."

B. The situation as respects the complainant the *Cleveland Electric Railway Company* is quite similar to that which we have been discussing as to the other complainant. In 1879 an ordinance was passed granting to this company the right to build a road as far west as Wilson Avenue and to City limits, and in this ordinance the council reserved the right to thereafter increase or diminish the rate of fare. It appears by the allegations of the bill that prior to the 15th of September the East Cleveland Company was operating a line of railway from the intersection of Superior and Water Streets to the easterly limits of the City of Cleveland on Euclid Avenue; that it had various grants, some of the city and some from county commissioners and some from the village of East Cleveland; that it had but a single track; that it was charging two fares between Water Street and the easterly limits of the city. And it was in this situation when the council passed the ordinance of September 15, 1879, containing the reservation under which it now claims the right to pass the ordinance of 1898. After the passage of the ordinance of 1879 the company continued to charge two fares up to April 4, 1883, when the council passed an ordinance providing for an additional track on Euclid Avenue and containing the same reservation as respects fare. It appears in the record that this arrangement was unsatisfactory both to the company and to the public and that growing out of this dissatisfaction in *March, 1886* a new ordinance was passed fixing the rights of the company upon this Euclid Avenue line; and it was in this ordinance of 1886 provided that "*the rights as herein*

granted and conferred are upon the express condition, however, that such company shall charge and collect but one fare of not more than five cents for each passenger one way in either direction between the easterly limit of said city on Euclid Avenue and the westerly terminus of said company's tracks at the intersection of Superior and Water Streets, and upon the further condition that the said company shall run through cars over said line between said points last named in each direction as the public convenience requires, and the opinion of the common council by resolution expressed may require." And section 5 of the same ordinance provides "that the rights herein granted to lay and operate a double track street railroad on *Euclid Avenue between Fairmount Street and the easterly limits of the city shall cease and determine on the 20th day of September, 1904, as provided for said company's contracts on Euclid Avenue west of Fairmount Street.*"

There is contained in this ordinance no reservation of any right of the council to thereafter change the rate of fare, and the rate of fare is fixed upon the entire line of the road at five cents until the year 1904. The original ordinance of 1879 contained a reservation as to fare; the ordinance of 1883 contained a reservation as to fare; but in 1886 the council legislating upon the same subject matter and in respect to the same lines of road legislate and contract upon the subject of fare to be charged and it entirely omits any reservation as contained in the former ordinance and fixes the rate of fare in express terms for *the period covered by said ordinance of 1879 in which said reservation is found;* and this ordinance and contract of 1886 is still in force and effect. It in express terms prescribes the rate of fare which the company shall charge until 1904, and it obligates the company to operate through cars and maintain a double track and says that such right *shall terminate with the original ordinance of 1879* and *the ordinance of 1879 so referred to is the ordinance containing the reservation under which the city claims authority to act in 1898.* It is perfectly

apparent that it could not have been in the minds of the parties contracting that the reservation of the right to regulate fare in the ordinance of 1879 should be operative after the express contract in relation to fares for the entire period of the grant so made in the ordinance of 1886.

Again, it is submitted, quoting from the opinion of the Circuit Court:

> " Again, the council having in the ordinance of 1879 reserved the right to thereafter increase or diminish the rate of fare, did in 1886, in the making of this contract, fix the rate of fare at five cents, to extend from the passage of the ordinance up to the expiration of the grant made in 1879, so that it may be fairly said that the ordinance of 1886 was an exercise of the reserved right of regulation contained in the ordinance of 1879. But whether it be treated as an exercise of such right or as the entering into of a new contract, it is plain that after the passage and acceptance of the ordinance of 1886 there no longer remained in the city a right to increase or diminish the rate of fare to be charged on that line until the expiration of the grant of 1886, to wit, the year 1904. Again in 1888 an ordinance was passed granting the East Cleveland Railroad Company the right to construct and operate its road by electricity on Euclid and Cedar Avenues and in this ordinance it is recited whereas there is a desire on the part of the people residing in the easterly portion of the city for a more convenient and rapid mode of transit, and that an electric system be substituted for animal power for the movement of cars, therefore the East Cleveland Railroad Company is granted permission, etc. And in section 6 of the ordinance it is provided ' Nothing herein shall be so construed as to authorize any increase of present fare for transportation over any portion of said company's

lines.' * * * It is apparent that the 'present fare' referred to in the ordinance of 1888 must have had reference to the fare which the company was then charging and as fixed in the ordinance of 1886, namely, a cash fare of five cents."

Again, in 1886 the company acquired the right to operate a line for twenty five years from that date at the then present rate of fare referred to in the ordinance, namely, a cash fare of five cents. And in 1889 an ordinance was passed granting the East Cleveland Railroad Company a right to construct what is known as the Wade Park Avenue line, and by Section 4 of this ordinance it is provided "permission is granted upon the express condition that no increase of fare shall be charged by said company on any part of its main line or said extension, and but one fare and not exceeding five cents or one of said company's tickets shall entitle a passenger to transportation over the main line and extension from the intersection of Lake and Water Streets to the easterly limits of the city, or from the easterly limits of the city to the intersection of Lake and Water Streets."

This ordinance of 1889 covers that portion of Euclid Avenue with respect to which it is claimed that the city may now regulate fares under the reservation in the ordinance of 1879. But it specifies, as did the ordinance of 1886, the rate of fare to be five cents upon the entire line.

Again, the complainant the Cleveland Electric Railway Company, is a consolidated company and each of its constituent companies were operating independent lines of railway in the city of Cleveland, each of them having a right to charge under grants which had not expired, a cash fare of five cents, and the city council consented to the terms of such consolidation providing in such consent that "only one fare" should be charged, and the one fare there mentioned must have reference to the present rate of fare then charged by the constituent companies, the fare of five cents.

Again, quoting from the opinion of the Court below, we submit: "It thus appears that by virtue of the ordinance of 1886 the East Cleveland Railroad Company was authorized to operate its line and cars to the end of its term at a cash fare of five cents. That each of the constituent companies which form the present complainant the Cleveland Electric Railway Company was also authorized for a period of time which has not yet expired to charge a cash fare of five cents. That these different lines have been merged by consolidation. That under the consolidation the system is being operated as an entirety. The portion of the Euclid Avenue line to which the reservation of the ordinance of 1879 had reference as an independent line has long since ceased to be such, and the relations of the consolidated company and the city under these various grants are so fixed as that to admit the reserved power of regulation in the ordinance of 1879 to be now operative would be to impair the obligations of the several subsequent contracts in which the rate of fare is definitely fixed without reservation."

Also as pointed out in the discussion of the question as to the other complainant, as a matter of practical railroad operation, it is difficult to see how the confessed rights of the parties could be worked out if effect is given to the alleged reserved power in the ordinance of 1879.

It is thus clear, we submit, as respects both of these complainants, that the contract relations existing between them and the City of Cleveland were such that the legislative enactment of 1898 seeking to reduce their rates of fare could not be operative because it was absolutely inconsistent with existing contracts between the parties.

IV.

It is contended by counsel that the reservation in the ordinance of 1879 of the right to increase or diminish the rate of fare was an obligation within the meaning of that section of the statutes of Ohio which deprives councils of the power to release a grantee from such obligation or liability. It is clear, we submit, that a reserved power of subsequent legislative regulation is not an "obligation" or a "liability." But even if we were wrong in this contention, it has been long settled by the law of Ohio that this provision of the statute does not prevent modification at any time of the contracts between street railway companies and the cities. As the city has power in the first instance to make the contract, by the same delegation of power it may modify the contract, except so far as modification is prohibited by statute.

And in the case of *Clement vs. City of Cincinnati, 16 Weekly Law Bulletin, 335*, in which case application was made to the Supreme Court for leave to file a petition in error, which was refused, thereby operating as an affirmance of the judgment *(see 19 Weekly Law Bulletin, 74)*, the Court held : " *The modification of a contract between the city and the owner of a street railroad route made in good faith for the better accomodation of the public is not void by virtue of Section 2502 of the Revised Statutes, and the release of the grantee of such route from an obligation, although in consideration of more rapid transit involving greater expense and higher rate of fare, is permitted. See also City of Cincinnati vs. Street Ry. Co. 31 Weekly Law Bulletin, 308 ; and Woodson vs. Murdock, 22 Wallace, 351.*

In the summary statement of appellant's contention found on *pages 39 and 40* of their brief are several propositions upon which we beg to briefly comment. It is said :

a. " That in none of the ordinances subsequent to the ordinances of 1879 was there anything which ex-

pressly surrendered or waived the rights of the city to regulate the rate of fare, nor was there any ordinance which is inconsistent with the provisions of these original renewal ordinances."

We have already pointed out as we think that whether the subsequent ordinances be treated as an exercise of the reserved power of regulation or whether they be treated as new and independent contracts, they were ordinances which related to the same subject matter and in express terms provided for a rate of fare fixed for the entire term, and were absolutely inconsistent with any future regulation under said reservation.

b. Again it is said " that any attempt to treat the consents to extensions, consolidations or changes of motive power as renewals of the rights renewed by the ordinances of 1879 must be nugatory in view of the positive provisions of statute above cited, which confer upon municipal councils the power to make such renewals only at the expiration of existing grants."

It is not true that there is any limitation upon the power of councils to make extensions before the expiration of existing grants. On the contrary, it has been expressly determined by the Supreme Court of Ohio that " *renewals may be made before the expiration of the original grant.*" See *State ex rel. vs. East Cleveland Railroad Company, 6 CC, 318. Affirmed by Supreme Court 27 Law Bulletin, 64 ;* also *Cincinnati vs. Cincinnati St. Ry. Co., 31 Law Bulletin, 308.*

Again, it is suggested by counsel that as the statutes of Ohio provide that upon consolidation or extension there shall be no increase of fare, that the fixing of fare for the entire term, if it be treated as rendering inoperative the reserved rights in the ordinance of 1879, would be a violation of this statute.

It is a complete anwser to this suggestion to point out that in no one of the ordinances upon which complaints rely was there an increase of fare. They simply amounted to a confirmation of the rights of the

company for the periods named to continue to charge the existing rate of fare, which was five cents.

Again, the reserved right is to increase as well as to diminish, and if the effect of subsequent ordinances was to increase the fare, such action was within the reservation.

V.

The several resolutions to which references have been made passed by the city council approving the terms of consolidation and fixing the rates of fare which should be observed by the consolidated companies constituted action of the city council passed in pursuance of *3443 of the Revised Statutes*, and this statute provides in express terms "*council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated.*" And the only limitation upon the power of the council *in* thus consenting to terms of consolidation, construction and operation is that in case of an extension or of a consolidation no increased rate of fare shall be allowed. Under the statutes as set forth in the appellant's brief, it appears that the whole subject matter of construction, operation, extension, renewal and consolidation of street railroad companies is referred by legislation to the council with absolute power to contract with reference to all these matters, subject only to the limitation that where companies consolidate or where the ordinance relates to an extension, there shall be no increase of fare. In none of the ordinances upon which the complainants relied below as determining their rights was there any attempt made to increase the present rates of fare, but they were each and all contracts duly and legally made by which the city

council of Cleveland fixed for terms of years which have not yet expired specific rates of fares which might be charged by the companies over their lines of road, which lines included that small section of the present property which was affected by the ordinances of 1879. An exercise of power under the reservation in 1879 cannot be had consistently with the admitted present contract relations between the companies and the city.

VI.

That a contract to charge "not more than five cents" confers the right for the term to charge five cents fare.

Detroit vs. Detroit Ry. Co., *supra.*

It is respectfully submitted that the judgment below should be affirmed.

WM. B. SANDERS
Of Counsel.